Deconstructing the Constitution

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By "deconstructing," I mean reading a text to elucidate its quarrels with itself, the contradictions and uncertainties suppressed beneath its superficial order. This kind of reading is usually associated with Jacques Derrida[1] although others have practiced it;[2] and in any event, I do not claim to be writing an orthodox Derridean analysis, whatever that might be. But I do hope to go beyond repeating that the Constitution contains compromises and ambiguities. It is less a system of blurred boundaries than a whirlpool, preserving its shape by catching us all up in its motions and countermotions.

Reading the Constitution in this way can help to show that many of our own quarrels about it are written into the text. The antimajoritarian difficulty, for instance, did not arise for the first time when theorists tried to justify judicial review in a democracy. Rather, it has been present ever since the Framers wrote a Constitution that seeks simultaneously to ground itself on majority rule and to limit the majority's power.[3] The resulting conflict is not just about the Constitution, but part of it, and would still be part of it if the Constitution contained no Article III providing for federal courts, and no Article VI making the Constitution the supreme law of the land. Indeed, this and other conflicts are part of what the Constitution constitutes. Readings that develop this perspective should not lead to the demolition and dismissal of the Constitution, or to some particular theory of its meaning; but they may enlarge our thoughts about what a constitution is and how one can live in it.

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1. *See, e.g.*, J. DERRIDA, DISSEMINATION (B. Johnson trans. 1981); J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); *see also* B. JOHNSON, THE CRITICAL DIFFERENCE (1980). For a caustic response, see Searle, *The Word Turned Upside Down*, N.Y. REV. OF BOOKS, Oct. 27, 1983, at 74.

2. *E.g.*, A. GOULDNER, THE TWO MARXISMS (1980). Precursors include Freud, and arguably Marx. *See* S. FREUD, THE INTERPRETATION OF DREAMS (J. Strachey trans. 1965); K. MARX, CAPITAL, ch. 1, sec. 4 (S. Moore & E. Aveling trans. 1967).

3. For the antimajoritarian difficulty, see, for example, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962), J. ELY, DEMOCRACY AND DISTRUST 4-14, 44-48 (1980), L. TRIBE, AMERICAN CONSTITUTIONAL LAW 9-11, 47-52 (1978), and the text accompanying notes 30-57 *infra*.

I.

Can the Constitution be read as a scene of repressed conflict? On the surface, as James Boyd White observes, it speaks with directness, authority, energy, austerity—a voice of union in every sense.[4] Speaking from the Age of Reason, it disclaims the resonance of earlier myths. Yet, as with other political texts,[5] disunion may lurk beneath the surface. A prime purpose of legal texts is to create the appearance of being unequivocal: "even more important than application of the rule is the task of getting it accepted that something exists as *the* rule."[6] Thus, the appearance of union may be deceptive. The Constitution's avoidance of figures of speech is itself a figure insinuating simplicity and honesty, like the plain dress of a Quaker.

Legal texts, moreover, need to be obscure as well as clear. At times, people want to recommend the Constitution because "the whole of it is expressed in the plain, common language of mankind."[7] At times, people hold out the hope that "some subjects were left a little ambiguous and uncertain."[8] So the Constitution's first equivocation concerns just how unequivocal it means to be.

The reader's purposes help create or dispel the Constitution's harmony. We usually read legal writings in the light of their use to decide controversies, and therefore demand at a minimum that they be complete and consistent. Every act must be either lawful or unlawful; none can be both. Usually, we ask also that so far as possible legal writings be read to have premises consistent with those of other legal writings and previous interpretations.[9] These purposes have centripetal effects: they call on the law to speak with a single voice.[10] But there are also centrifugal forces: the needs and perspectives of different eras, the values of different readers, or simply the desire to find many voices in the law.[11]

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4. J.B. WHITE, WHEN WORDS LOSE THEIR MEANING 240-44 (1984). I am indebted to White's pioneering analysis of the Constitution as a literary text.

5. *See* P. DE MAN, ALLEGORIES OF READING 246-77 (1979) (discussing Rousseau's writings); J. DERRIDA, OF GRAMMATOLOGY, *supra* note 1, at 295-302 (discussing Rousseau's writings); A. GOULDNER, *supra* note 2 (discussing Marx's writings); Derrida, *Declarations of Independence*, NEW POLITICAL SCIENCE 7 (Summer 1986).

6. A. GLUCKSMANN, THE MASTER THINKERS 50 (B. Pearce trans. 1980) (emphasis in original).

7. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 369 (M. Farrand rev. ed. 1937) (Caleb Strong's later statement) [hereinafter cited as M. FARRAND]; *see* 2 *id.* at 137 (putting forth Edmund Randolph's view that a constitution should "use simple and precise language, and general propositions").

8. 3 *id.* at 370 (Abraham Baldwin's later statement); *see* THE FEDERALIST NO. 37 (J. Madison).

9. *See* R. DWORKIN, LAW'S EMPIRE 225-75 (1986). Requiring the text to be read consistently with what is known of its author's intent may further limit the interpretation. *See* E.D. HIRSCH, VALIDITY IN INTERPRETATION (1967). This conclusion, however, depends on how unequivocal one thinks the intent is, and on what means of establishing it one allows.

10. *See* Goodrich, *Historical Aspects of Legal Interpretation*, 61 IND. L. J. 331, 334-49 (1986).

11. *See* Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1984).

In approaching a constitution that is without insistent centripetal demands, one might expect to find it both more and less likely to quarrel with itself than a literary or philosophical text. Less likely, because it is written to speak decisively. (Yet just this goal may lead to the repression, not the elimination, of discord.) More likely, because it embodies compromises between conflicting groups. (Yet if the disputants have faced and resolved their disagreements, less hidden conflict may remain.) Some, indeed, would find it of little significance that many authors rather than one contributed words to a constitutional text. For them, whoever wields the pen, it is a cultural tradition that writes.[12]

The Constitution's treatment of slavery provides an obvious example of the exclusion from the text's surface of any explicit mention of one of its concerns. The Convention protected the interests of slaveholders in at least three provisions, not one of which uses the word "slave."[13] Everyone knew that the provisions referred to slaves.[14] Some say that the word was omitted to avoid offending opponents of slavery,[15] yet it is hard to see how using obvious euphemisms would accomplish this. A sense of decorum was at work, but also a belief in the power of words to legitimate. Authors of constitutions, more than anyone else, should believe in that power.

As this example shows, the Constitution, like other writings, sometimes says and does not say something at the same time. Its language is not a transparent medium that does no more than communicate thoughts lying behind it, but itself helps constitute the message in complex and ambivalent ways.[16] The failure to say "slaves" is itself part of the text, and interpreters have debated its implications.[17]

The framing of the Constitution took place at what amounted to

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12. *E.g.*, J. DERRIDA, *Plato's Pharmacy* in DISSEMINATION 61, 85, 95-96 (B. Johnson trans. 1981); *see* F. JAMESON, THE PRISON-HOUSE OF LANGUAGE, 137-44 (1972).

13. U.S. CONST. art. I, § 2 ("[F]ree persons" and "three fifths of all other Persons" counted in apportioning representation); art. I, § 9 (limiting Congress' power to prohibit the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); art. IV, § 2 (providing for the return of escaping "Persons held to Service or Labour in one State"); *see, e.g.*, W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-83 (1977) (describing other clauses as also drafted with slavery in mind).

14. *E.g.*, 1 M. FARRAND, *supra* note 7, at 580-88; 2 *id.* at 220-423, 369-74, 443; THE FEDERALIST No. 42 (J. Madison); THE FEDERALIST No. 54 (J. Madison or A. Hamilton).

15. *See, e.g.*, S. LYND, *The Abolitionist Critique of the United States Constitution*, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION 159 (1967); W. WIECEK, *supra* note 13, at 75-76, 79-80.

16. This particular example may have further complexities. The Convention's debates and compromises about slavery may have masked another compromise arranged behind the scenes. *See* F. MCDONALD, E PLURIBUS UNUM, THE FORMATION OF THE AMERICAN REPUBLIC, 1776-1790, at 182-83 (1965).

17. *See, e.g.*, The Amistad, 40 U.S. (15 Pet.) 518, 556 (1841) (argument of counsel); E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 75-77 (1970) (views of Salmon Chase, later Chief Justice); CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 384-86 (P. Angle ed. 1958) (views of Lincoln); W. WIECEK, *supra* note 13, at 263-64, 272-74.

several levels of consciousness, so we should not be surprised to find in it concealed conflicts and accommodations. Delegates spoke for themselves, but voted by states, and reconstituted themselves into many entities: the committee of the whole, the committee of detail, the committees of eleven, the committee of style, and the plenary Convention.[18] Behind the scenes, managers struck deals which they tried to conceal from other delegates,[19] or sought to slide a significant semicolon into the text.[20] Where opinions conflicted about the judiciary, Gouverneur Morris later explained, "it became necessary to select phrases, which expressing my own notions would not alarm others."[21] In the minds of each participant, moreover, conflicting ideologies jostled each other.[22]

The Convention both repressed and disclosed its disputes: it was ambivalent about its own ambivalences. The delegates ostentatiously shrouded their proceedings in secrecy.[23] Yet delegates recorded the Convention's disagreements, and preserved their records for ultimate release.[24] *The Federalist* might be considered an attempt to paper over the Framers' ambivalence about disclosure. It spoke of the Convention's intent, but of a unanimous, sanitized intent. By ascribing purposes and theories to the unexplained commands of the Constitution, it invited historical and philosophical explorations; but it also ensured that many of the explorations would concern *The Federalist* itself, which for posterity tended to merge with and obscure the work of the Convention.

The Constitution, finally, speaks with more than one voice because it erases and preserves and blends with other voices. It supersedes the Articles of Confederation; but by doing so it makes readers ask whether a given clause in the Constitution was meant to continue the previous regime or change it; and one may then ask just what was the meaning of

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18. *See* 1 M. FARRAND, *supra* note 7, at 7-8, 29; 2 *id.* at 128, 483, 553, 641. The index, 4 *id.* at 140-41, lists twelve committees in all, and these committees were sometimes used to work out compromises. *See* C. COLLIER & J. COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 128-30, 173, 226-27 (1986).

19. *See* C. COLLIER & J. COLLIER, *supra* note 18, at 125-29, 146-49, 160-65, 175-76; F. MCDONALD, NOVUS ORDO SECLORUM 159, 176-84 (1985); S. LYND, *supra* note 15, at 185-213.

20. *See* F. MCDONALD, *supra* note 15, at 186-88; *see also* C. COLLIER & J. COLLIER, *supra* note 18, at 201-02 (asserting that Luther Martin deliberately failed to mention state constitutions when proposing the Supremacy Clause).

21. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), *reprinted in* 3 M. FARRAND, *supra* note 7, at 420. Morris, who wrote the final version of the Constitution for the Committee of Style, also devised an ambiguous form of approval for the Convention in the hope of concealing dissent from the public. 2 M. FARRAND, *supra* note 7, at 643.

22. *See, e.g.*, J. APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER (1984); F. MCDONALD, *supra* note 19; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

23. *See, e.g.*, F. MCDONALD, *supra* note 19, at 276-77. "Under an Injunction of Secrecy they carried on their works of Darkness until the Constitution passed their usurping hands." S. LYND, *supra* note 15, at 241 (quoting a 1789 anti-federalist manuscript).

24. See, *e.g.*, C. WARREN, THE MAKING OF THE CONSTITUTION 786-804 (1929). The omissions and distortions of the record testify to a further ambivalence. *See* Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

the provision in the Articles that the Constitution sought to continue or change.[25] The Constitution proclaims itself the supreme law of the land, yet to some extent it preserves existing law, so that we must ask: To what extent? and; What does the Constitution take that law to have been?[26] It says what acts will bring it into effect;[27] but that statement itself may be effective only to the extent that it aligns itself with antecedent declarations about how people establish constitutions,[28] and those declarations will henceforth be modified by the example of the Constitution. Entering into these ambivalent entwinings with older voices, the Constitution in turn gives rise to a world of newer voices that will expound, debate, empower, and distort it.[29]

II.

Who speaks the Constitution? Starting from the beginning, one seems to be hearing "We the People of the United States." Turning to the end of the text, however, we find the signatures of individual delegates, grouped by states. This discrepancy parallels others.

What do the speakers accomplish through their speech? The preamble states that the People "do ordain and establish this Constitution for the United States of America." Again, however, the end of the text undercuts its pompous exordium. Article VII tells us that there will be no "Establishment of this Constitution" until the conventions of nine states ratify it. Meanwhile, the first six articles should be read as though they are in quotation marks, a discourse that We the People may soon pronounce.[30] And even when they do pronounce it, the words will have been put into their mouths by the signing delegates. The promul-

25. For recourse to the Articles of Confederation to construe the Constitution, see, for example, Zobel v. Williams, 457 U.S. 55, 78-80 (1982) (O'Connor, J., concurring); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406-07 (1819); THE FEDERALIST No. 41 (J. Madison). *Cf.* H. BLOOM, POETRY AND REPRESSION 2-4 (1976) ("[P]oems are not things but only words that refer to other words. . . . Any poem is an inter-poem, and any reading of a poem is an interreading.")

26. *See* U.S. CONST. art. IV, § 3 (the Constitution shall not "be so construed as to Prejudice any Claims of the United States, or of any particular state"); art. VI (all previous debts and engagements "shall be as valid against the United States . . . as under the Confederation" and treaties "made, or which shall be made" shall be law of the land); *cf.* Wharton v. Wise, 153 U.S. 155 (1894) (adjudicating validity under Articles of Confederation of 1785 agreement between states). Other provisions, of course, can be understood only by reference to previous law, which they may nevertheless change. *See e.g.*, U.S. CONST. art. I, § 9 (referring to writs of habeas corpus, bills of attainder, and ex post facto laws).

27. U.S. CONST. art. VII.

28. *See* R. HOAR, CONSTITUTIONAL CONVENTIONS 38-57, 214-19 (1917) (discussing validity of state constitutional amendments approved by convention in violation of the state's existing constitution); *see also* H.L.A. HART, THE CONCEPT OF LAW 92-93, 97-120, 144-50 (1961) (discussing rules of recognition for determining what are the rules of a legal system).

29. *See* J.B. WHITE, *supra* note 4, at 244-47 (noting ways in which the Constitution calls for debate about itself).

30. "It is to be remembered, Sir, that the Constitution began to speak only after its adoption . . . . But when ratified . . . , then it had a voice, and spoke authentically." D. WEBSTER, *The Constitution Not a Compact Between Sovereign States* (1833), in 3 THE WORKS OF DANIEL WEBSTER 448, 465 (Dartmouth College ed. 1974) (12th ed. Boston 1860). Webster

gation of the Constitution begins to look like an act of ventriloquism, with a small confabulation of delegates playing the role of the Wizard of Oz behind the sonorous public announcement of We the People.[31]

The Constitution itself thus enacts the merger of the voice of the people and the voice of those who claim to speak for them—the merger that the naive blame on an activist Supreme Court speaking its own judgments while pretending to deliver the Constitution's, but that one can trace back to Hobbes' distinction between the voices of the multitude and the voice of the people.[32] Do we hear one voice, two, or some indecipherable blend? Do the Convention and the People both miraculously want to say the same thing, or has the Convention substituted its own words for those the People would have pronounced? How can the People ever speak except through the voices of individuals? Who decides who are the people?[33]

Just as the Constitution seeks to become the speech of the People, the legal order it constitutes seeks to root itself in existing legitimacies already ratified by the People. And just as the Convention could not speak for the People without distortion, the new legitimacy could not come into existence without fracturing the legitimacies from which it claimed to grow. If the new government had been established by the authority of the states, it would have been their creature, subordinate to them and subject to nullification and secession.[34] But if it owed its authority to some other source, its creation was a revolutionary act. How could it then be a source of stability and legitimacy? The Constitution must seek to have it both ways, to rest on the existing order while simultaneously replacing it.

Within the text, the old and new legitimacy struggle inextricably. "We the People of the United States" can be defended as a description of thirteen Peoples; but the phrase also evokes the image of a single

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describes the Constitution as speaking for itself, with a voice somehow acquired from the people.

31. L. BAUM, THE WIZARD OF OZ 95-97 (M. Hearn ed. 1983); *see* A. FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS 87-111 (1984) (describing the Constitution and Federalist papers as arising from a new culture of public written discussion, and their suspicious opponents as speaking for a more traditional, oral culture).

32. T. HOBBES, DE CIVE OR THE CITIZEN ch. XII, pt. 8 (S. Lamprecht ed. 1949) (distinguishing the people, which has one will, from the multitude; "in a monarchy, the subjects are the multitude, and . . . the king is the people"); *see also* E. BURKE, *An Appeal from the New to the Old Whigs*, in 2 WORKS 57, 169-72 (1880) (arguing that the people can come into existence as an entity only by common agreement and organization).

33. *Compare* U.S. CONST. amend. XIV, § 1 (constitutional amendment declares who are U.S. citizens) *with* Dred Scott v. Sanford, 60 U.S. 393 (1857) (Court decides Blacks cannot be state citizens for diversity jurisdiction purposes); *compare* Wesberry v. Sanders, 376 U.S. 1 (1964) (Court decides election of Representatives "by the People of the several States" requires districts of equal population) *with* Soifer, Book Review, 67 GEO. L.J. 1281, 1286 (1979) (reviewing W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977)) ("the leading problem for contemporary constitutional scholars may be how to determine who constitutes 'We, the People' ").

34. *See* notes 41-42 *infra*.

People transcending the states.[35] The delegates punctiliously forwarded their creation to the Continental Congress, whose instructions they had stretched and whose death they had proposed.[36] The Constitution was to be submitted for ratification to the states; but the states were to act through conventions, not through whatever organs and procedures each of them had prescribed for itself in its own constitution and laws. The Constitution was to be established only "between the States so ratifying the Same"; but nine ratifications would bring it into effect, although the Articles of Confederation required confirmation "by the Legislatures of every State" for any amendment.[37] So the document which tells us that only that is law which has been created by duly elected officials, following prescribed procedures, within stated limits, could become the source of authority only by subtly transcending those requirements. Proclaiming its legitimate descent from the Articles of Confederation, the Convention killed them and begot the new order on its mother, "We the People." In the process, it claimed for itself another traditional but revolutionary role, that of the Platonic legislator who uses authority and propaganda to institute the new order.[38]

This did not pass unobserved. Patrick Henry asked: "what right had they to say, '*We* the People'? "[39] Federalists and Anti-Federalists debated whether the Convention had overstepped its authority, and whether ratification by the Conventions of nine states was consistent with the Articles.[40] The implications of the mode of ratification for the status of the resulting government were fully considered but not re-

35. Earlier drafts commenced "We the people of the States of New Hampshire, Massachusetts," and so forth. 2 M. FARRAND, *supra* note 7, at 177-565. The beginning of the Articles of Confederation referred only to states.

36. 2 *id.* at 665-67; *see* note 40 *infra*.

37. U.S. CONST. art. VII; ARTICLES OF CONFEDERATION art. XIII. *See generally* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57 (1987). One could argue, in a further twist, that the state legislatures impliedly amended the Articles of Confederation's amendment provision when they all summoned the Conventions specified by the Constitution. *See* F. MCDONALD, *supra* note 19, at 279.

38. *See* PLATO, THE LAWS 663-64, 684, 709-11; *see also* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 25-26, 30-32 (1984); N. MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS bk. I, ch. 9 (1513-17), in 1 THE CHIEF WORKS AND OTHERS 217-20 (A. Gilbert trans. 1965); J.-J. ROUSSEAU, ON THE SOCIAL CONTRACT bk. II, ch. 7 (D. Cress trans. 1983) (1st ed. 1762).

39. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 22 (J. Elliot ed. 1836) (Virginia Convention) (emphasis in original); *see also* 4 *id.* at 15-16, 23-25 (North Carolina Convention); 2 *id.* at 134 (Massachusetts Convention).

40. *See, e.g.*, 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 304-49 (M. Jensen ed. 1976) (debate in Confederation Congress); THE FEDERALIST No. 40 (J. Madison); Storing, *Conservatives*, in 1 THE COMPLETE ANTI-FEDERALIST 7-8, 12-14 (H. Storing ed. 1981); *A Letter from a Gentleman in a Neighboring State, to a Gentleman in this City*, 4 *id.* at 13; *Observations On the New Constitution and on the Federal and State Conventions by a Columbian Patriot*, 4 *id.* at 274-80. Washington and John Jay had privately doubted the Convention's legality. *See* G. WILLS, CINCINNATUS, GEORGE WASHINGTON AND THE ENLIGHTENMENT 154-57 (1984).

solved,[41] starting a debate that took the Civil War to silence.[42]

The coup of 1787 followed some of the patterns set in 1776. Then too, the delegates had ventured to speak "in the Name, and by Authority of the good People of these Colonies."[43] Then too, they were prepared to push their delegated authority to its limits.[44] Then too, they appealed to an old legitimacy while establishing a new one, not simply relying on "the Laws of Nature and of Nature's God" but asserting that the King had subjected them "to a jurisdiction foreign to our constitution" and had "abdicated Government here."[45] Thomas Jefferson, of course, had been far more open than the Framers in declaring a break with the past; in 1776, it was neither possible nor politically desirable to mask the discontinuity. The men of 1787, by contrast, found it possible and desirable to maintain that they came not to destroy, but to fulfill the old law.

The events of 1787 in turn prepared the way for future constitutional restatements. Proclaiming its desire to "secure the Blessings of Liberty to ourselves and our Posterity," the Constitution took the liberty of speaking for that posterity.[46] Posterity, in due course, fought to decide who would be "We the People." It reconstituted the Union in the thirteenth and fourteenth amendments, seeking to free the slaves and to bind the states through ratifications as questionable as those

41. 2 M. FARRAND, *supra* note 7, at 88-94, 475-79, 559-63; THE FEDERALIST No. 22 (A. Hamilton); THE FEDERALIST No. 39 (J. Madison); G. WOOD, *supra* note 22, at 532-36.

42. *See, e.g.*, H. BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 30-40 (1837); J. CALHOUN, *A Discourse on the Constitution and Government of the United States* (written 1848-49), in 1 THE WORKS OF JOHN C. CALHOUN 109, 119-34 (R. Cralle ed. 1851); R. ELLIS, THE UNION AT RISK 88 (1987)("The Old man [President Jackson] is against secession, and I grieve to say, talks about, we the people, whenever he encounters one bold enough to suggest the possibility of his being in error.") (quoting 1832 letter of Congressman B. B. Wisner); JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 361-66 (4th ed. 1873)(1st ed. Boston 1833); D. WEBSTER, *supra* note 30.

43. The Declaration of Independence para. 32 (U.S. 1776); *see* Derrida, *Declarations of Independence*, *supra* note 5. Madison quoted the Declaration in his vindication of the Convention's proceedings. THE FEDERALIST No. 40, at 253 (J. Madison) (C. Rossiter ed. 1961).

44. Some delegates spoke—and voted in preliminary votes—beyond their instructions, but by the final vote their instructions had been changed. *See* D. HAWKE, A TRANSACTION OF FREE MEN 116-34, 177-84 (1964).

45. The Declaration of Independence para. 1, 15, 25 (U.S. 1776). For the colonists' concern for legality, see J. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986); G. WILLS, INVENTING AMERICA 49-64 (1978); Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976). The reference to abdication not only sought to minimize the Declaration's defiance of previous legality by implying that the king had waived his powers, but did so in a way itself hallowed by English precedent. In the Revolution of 1688, Parliament had similarly relied on a constructive abdication. 5 PARL. HIST. ENG. 50, 107 (1688).

46. A few years later, Jefferson and Condorcet challenged the power of a generation to bind its successors. 15 THE PAPERS OF THOMAS JEFFERSON 390-97 (J. Boyd ed. 1958); *see* G. WILLS, *supra* note 45, at 132. But Madison disputed the challenge. 16 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 146-54; *see also* D. HUME, *Of the Original Contract*, in HUME'S ETHICAL WRITINGS 255, 259, 264-65 (A. MacIntyre ed. 1965).

proposed by the original Convention.[47] In every generation, moreover, judges, legislators, and other powerful people respeak a Constitution that changes in their mouths, speaking for the Framers as the Framers spoke for We the People.[48]

The Constitution might be defined as an immense system of ventriloquism, in which each voice represents and usurps the next.[49] The courts speak for the Constitution and statutes. The Constitution and statutes speak for the Convention (or is it the state ratifying conventions?) and for Congress. The Convention, Congress and the Electoral College speak for the voters.[50]

Each speaker's authority comes from those for whom he speaks. Yet his own voice will modify the message, and the Framers thought this sometimes a good thing. The judges are "of vast importance in mitigating the severity, and confining the operation of [unjust and partial] laws."[51] Supermajority requirements and constitutional prohibitions are designed to prevent Congress from legislating unwisely.[52] Legislators (and members of the Convention) prevent unjust majorities among the voters from having their way,[53] "refining the popular appointments by successive filtrations."[54] Voters were considered more responsible than those not allowed to vote: slaves, women, minors, Native Americans, and in some states those without property.[55] In short, like crimi-

47. *See* L. Cox & J. Cox, Politics, Principle, and Prejudice 1-30 (1963); J. Franklin, Reconstruction: After the Civil War 67-73, 130 (1961); R. Patrick, The Reconstruction of the Nation 132-36 (1967); L. Thomas, The First President Johnson 347, 366-71 (1968); Ackerman, *supra* note 37, at 1064-69; note 40 *supra* and accompanying text.

48. *Cf.* Montesquieu, The Spirit of Laws 196 (D. Carrithers rev. ed. 1977) (T. Nugent trans., 1st Eng. ed. 1750) ("judges are no more, than the mouth that pronounces words of the law, mere passive beings"); *see* D. Webster, *supra* note 30 (speech in which Webster, describing the Constitution itself as speaking, spoke for it).

49. Derrida finds in Rousseau the analogy between political representation and the representation of spoken words by writing, each communicating for and betraying what it represents. *See* J. Derrida, Of Grammatology, *supra* note 1, at 295-302.

50. *See, e.g.*, The Federalist No. 39 (J. Madison); *id.* No. 57 (J. Madison or A. Hamilton). "When the Supreme Court speaks it is the Constitution—it is the people—speaking." M. Kammen, A Machine That Would Go of Itself 278 (1986) (quoting Sen. Vandenberg).

51. The Federalist No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961); G. Wood, *supra* note 22, at 456-59. *But see* Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 889-94, 905-09, 913-14 (1985) (describing eighteenth century fear of interpretation).

52. *E.g.*, U.S. Const. art. I, § 9; art. V.

53. *See, e.g.*, The Federalist No. 10 (J. Madison); *id.* No. 63 (J. Madison or A. Hamilton); G. Wood, *supra* note 22, at 188-96, 379-81.

54. 1 M. Farrand, *supra* note 7, at 50 (Madison).

55. *See* G. Wood, *supra* note 22, at 178-81; J. Madison, *Vices of the Political System of the United States*, in 9 The Papers of James Madison 345, 350-51 (1975) (criticizing as minority rule an alliance of a minority of the voters with slaves or people too poor to vote). The Convention decided not to limit the franchise more narrowly than the states did. *See* 2 M. Farrand, *supra* note 7, at 201-06; *see also* R. Brown, Middle-Class Democracy and the Revolution in Massachusetts 1691-1780 (1955) (describing state property qualifications as relatively minor). The Convention did not consider extending the vote to people excluded by states.

nal defendants,[56] citizens may find their rights to be represented by someone else to be a precious but dangerous privilege.[57] After two hundred years, it is harder than ever to figure out who is speaking for whom.

III.

The Constitution tells us that it will unify powers previously divided. It was written "to form a more perfect Union, . . . provide for the *common* defence, promote the *general* Welfare."[58] Inability to protect against foreign invaders, quarrels between states, and general governmental weakness were the problems calling it into existence. [59] It established a central government acting directly on each citizen,[60] a government that roused its supporters to song:

Our Freedom we've won, and the prize let's maintain
Our hearts *are all right-*
Unite, Boys, Unite
And our EMPIRE *in glory shall ever remain.*[61]

Yet the Constitution disperses and divides power along every dimension. Within the central government, each of the three branches depends on the others, and each can often block the others' efforts. These central branches in turn limit and are limited by the state governments. And we have already noted how members of the government speak for (and in the process interpret and obstruct) the voters. These three sets of divisions, moreover, intersect each other to further refract and fragment power. State legislatures (under the original Constitution) select senators; voters elect representatives; electors (appointed as state legislatures direct) usually elect the President, but sometimes the House of Representatives (voting by states) does; and so forth.[62]

What is the point of these contradictory thrusts? The Framers could scarcely have wished to set up a system that would obstruct all governmental action indiscriminately. Excessive inertia was what they condemned in the existing system.[63] It would have made no more

56. *See, e.g.*, Jones v. Barnes, 463 U.S. 745 (1983)(lawyer, not client, decides what appellate arguments to present).

57. *See* J.J. ROUSSEAU, *supra* note 38, at bk. 3, ch. 15 (voters are free only at the moment they vote); R. MICHELS, POLITICAL PARTIES ch. 2 (E. Paul & C. Paul trans. 1915; 1958 reprint ed.) (democracy leads to organization which leads to oligarchy).

58. U.S. CONST. preamble (emphasis added).

59. *See, e.g.*, Speech by Randolph (May 29, 1787), *reprinted in* 1 M. FARRAND, *supra* note 7, at 18-28; Speech by Madison (June 19, 1787),*id.* at 314-22; J. MADISON, *supra* note 55, at 348-50.

60. THE FEDERALIST No. 15 (A. Hamilton); *id.* No. 39 (J. Madison).

61. *The Grand Constitution* (1787), quoted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 344 (1981).

62. *See* U.S. CONST. art. I, §§ 2, 3; art. II, § 1. Some of the provisions described in the text have of course been changed by the twelfth and seventeenth amendments.

63. *See, e.g.*, M. WHITE, PHILOSOPHY, *The Federalist,* AND THE CONSTITUTION 149-66 (1987).

sense for them to establish a vigorous central government, masked by a mere pretense of checks and balances. Such a government might rush off in the wrong direction.[64]

Madison tried to resolve the Constitution's ambivalence about the unification of power in his theory of factions. A large republic would be less dangerous than a small one. It would frustrate sinister cabals by requiring each elected representative to secure the approval of a large number of voters, and by balancing one faction against others.[65] Yet the first of these factors, as Madison himself admitted, might simply produce representatives ignorant of and uncontrolled by their constituents;[66] and the encounters of factions seem as likely to frustrate good measures as bad ones. At most, one can say that in a large republic where power is divided, determined and persevering majorities are most likely to get their way. If the Framers had believed that in the long run the majority would steadfastly cleave to wisdom and virtue, they might reasonably have undertaken to set up a system that would frustrate transient majorities. Unfortunately, people at the time believed that in the long run political virtue is frail.[67]

Procedural systems tend to favor specific substantive results.[68] It might be that the Constitution seeks to accomplish the same aims when it divides power as when it unites it; it sets an agenda that will foster the actions for which the new government was empowered. As Madison's theory of factions shows, the Framers had some inkling of procedure's substantive implications.[69] But what are the substantive implications of the Constitution's procedures? What goal does the Constitution's frac-

64. The Framers might have assumed that elites sharing their own views, and their own interstate economic and political connections, would dominate the central government as they dominated the Convention. *See* G. WOOD, *supra* note 22, at 486-87, 507-13. But would they have expected this to last? And does the Constitution make sense today for those who do not share their hope?

65. *See* THE FEDERALIST No. 10 (J. Madison); *id.* No. 27 (A. Hamilton); *id.* No. 51 (J. Madison or A. Hamilton). *See generally* G. WILLS, EXPLAINING AMERICA (1981).

66. THE FEDERALIST No. 10 (J. Madison); *id.* No. 63 (J. Madison or A. Hamilton); Letter from Madison to Jefferson (Oct. 24, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON, *supra* note 46, at 270, 278 (in too large a republic, "a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration").

67. *See* G. WOOD, *supra* note 22, at 30-36, 65-70, 107-14, 413-25; *see also* J. POCOCK, THE MACHIAVELLIAN MOMENT 506-45 (1975). *But see* G. WILLS, *supra* note 65, at 182, 185-92 (ascribing different views to Madison). Wills makes an impressive argument that Madison (and perhaps also Hamilton and Jay) sought, not a balance of interests, but disinterested representatives devoted to the common good. But one must still ask why the Constitution's divisions of power would promote that goal. Wills' able presentation of Madison's attempts to answer that question still leaves those attempts looking to me like imaginative but unpersuasive rationalizations. *See id.* at 216-230.

68. *See, e.g.*, L. TRIBE, CONSTITUTIONAL CHOICES 9-20 (1985); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981); *see also* W. RIKER, LIBERALISM AGAINST POPULISM (1982) (describing public choice theory's conclusions on the defects of voting procedures).

69. THE FEDERALIST No. 10 (J. Madison); *see* D. BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 156-80 (1958) (describing Borda's paper of 1781 and Condorcet's of 1785 on the problems of voting systems).

tionalization of power promote, if not the very goal of delaying governmental action that seems irreconcilable with the Constitution's other goal of strengthening government? And why should the Framers have established this immense procedural labyrinth, instead of writing the policies they favored explicitly into the text? They were willing, after all, to approve substantive clauses protecting creditors,[70] merchants,[71] slaveholders,[72] and states with land claims and their grantees.[73]

The Constitution's double-mindedness about power, though it may not yield a coherent political theory, is well framed to beguile citizens who are similarly double-minded. To everyone, the Constitution holds out the hope of vigorous government action to realize her own vision of the good society. For surely, in the long run, the required majorities will adhere to what is good. At the same time, the Constitution promises everyone that it will check and balance factional schemers into impotence. Look at Madison's definition:

> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[74]

Only groups seeking bad goals are factions; and surely their low "impulse," especially when adverse to the "permanent . . . interests of the community," will never be sufficiently strong and enduring to unite what the Constitution has separated by so many divisions.

The constitutional scheme is like an enchanted castle, which draws each person within by the image of what he or she desires or fears, there to wander from chamber to chamber.[75] It offers power as a goal for our hopes, and division of power as a remedy for our fears. It constitutes a system of conflicts, so that today, (as W. D. Snodgrass says of a marriage) "if there's a world between us, it's our own."[76]

In this scheme, factions are regrettable but also necessary. If state governments were not the prey of factions, why did one need a strong central government? If factions did not multiply, how could they counterbalance each other? It is not surprising, therefore, that the Constitu-

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70. U.S. CONST. art. I, § 10 (contracts clause); art. VI (confederation's debts and obligations valid against new government).

71. U.S. CONST. art. I, § 10 (no state imposts or duties).

72. *See* text accompanying notes 13-14 *supra*.

73. U.S. CONST. art. IV, § 3 (states may not be divided; Constitution does not prejudice state claims).

74. THE FEDERALIST No. 10 (J. Madison); *see* Diamond, *Democracy and* The Federalist: *A Reconsideration of the Framers' Intent*, 53 AM. POL. SCI. REV. 52, 56-57, 67-68 (1959).

75. L. ARIOSTO, ORLANDO FURIOSO XII, 3-22 (W. Rose trans. 1968) (1st ed. 1516); *see* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 30-31 (1956) (reaching a similar conclusion about Madison's theory of factions).

76. Snodgrass, *Riddle*, in HEART'S NEEDLE 18, 19 (1959) (capitalization omitted). The Canadian Constitution contains a somewhat similar conundrum, in which national and provincial powers intertwine. Constitution Act, 1867, §§ 91, 92.

tion fosters the factions against which it guards. It divides power among groups, giving each group an interest to guard its own power and contest that power's boundaries.[77] It opens avenues by which groups can seek favorable governmental action, encouraging them to bestir themselves to do that, and encouraging others to join in resistance. It adds to the political agenda items such as the admission of new states, giving rise to conflicts its language is too obscure to prevent.[78] It recognizes but also helps to deepen divisions between trading and planting states, between free and slave states, between Eastern and Western states.

The Framers constructed this labyrinth; they were also its first inhabitants. Their concentration and dispersion of power reflected their own ambivalence about power, and about popular government.[79] They hoped and feared for themselves and their countrymen; but they found external objects for their fears.[80] This fortress against factionalism was constructed by delegates who quarreled in factions, and who argued the public interest to advance the interests of their home states. Later constitutional actors have continued to oscillate between fear and hope, between dispersal and concentration of power, between procedural safeguards and substantive goals. We shift between limited and strong government, between state and central government, between judicial restraint and judicial activism. We are all republicans: we are all federalists.

IV.

Imagine two kinds of constitution: a constitution of power, and a constitution of limits. The constitution of power exists to make governmental action possible. It trusts those who govern. It seeks to give rise to a living organism, which maintains continuity with the past while growing in directions that its founders could not foresee.[81] Its proponents therefore read it flexibly, revere *McCulloch v. Maryland*, and never

77. Gouverneur Morris argued that giving the rich control of the Senate would encourage them to abuse their power, and encourage others to check them: "By thus combining & setting apart, the aristocratic interest, the popular interest will be combined agst. it." 1 M. FARRAND, *supra* note 7, at 512-13. Madison asserted that "the only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties" that a majority was unlikely to combine to oppress the minority. *Id.* at 136.

78. *But cf.* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969) (arguing that the first amendment's establishment clause was meant to take religion out of politics).

79. A recent study seeks to classify some of the Framers as suspecting or accepting power. C. COLLIER & J. COLLIER, *supra* note 18, at 38-40, 58, 102-06, 240, 245, 251-52. Surely these attitudes mingled in each of them, albeit in different proportions. *Compare id.* at 28-29, 53-54 (describing Madison's fear of power as his leading motive) *with* G. WILLS, *supra* note 65, at 24-54 (Madison did not fear power of new government).

80. *See* G. WOOD, *supra* note 22, at 396-403, 409-13, 517-18. Pre-Revolutionary writers had dealt differently with their ambivalence about power. They saw it as exercised by others, and tending constantly to oppression. *See* B. Bailyn, *Introduction* in 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 3, 38-45 (B. Bailyn & J. Garrett eds. 1965).

81. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.); D. EPSTEIN,

forget that it is a *Constitution* they are expanding.[82]

The constitution of limits exists to prevent governmental abuse, and distrusts those who govern. It describes itself not in biological metaphors, but as a system of boundary lines or mechanical restraints.[83] Its proponents claim to read it along the lines originally laid down, revere *Marbury v. Madison*,[84] and assert that the Constitution is Law.

Every real constitution both empowers and limits, of course, but these functions combine in different ways. It is tempting, for instance, to think of the Constitution of 1787 as basically one of powers, with limits provided later by the Bill of Rights, the fourteenth amendment, and other additions. Because the limits were enacted after the powers, there can be no question that they prevail over the powers should the two conflict. On the other hand, the limits look marginal, supplementary, unimportant—as though the main function of our Constitution is to establish central power, with rights serving only to prevent the abuse of that power. This is not the only possible view; some people do believe that governments are instituted to secure rights.[85]

Treating rights clauses as containing only limits, and powers clauses as containing only powers, is, of course, simplistic. The Bill of Rights and fourteenth amendment confer power: the power of courts to construe and enforce them, the power of Congress to enact enforcing legislation,[86] and the power of officials to refuse on constitutional grounds to perform what would otherwise be their duties.[87] The original Constitution, even disregarding its express prohibitions,[88] limited the powers it conferred by the terms in which it conferred them,[89] and through the checks and balances it established. Powers and limits, then, entwine and struggle throughout the Constitution.

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supra note 38, at 43 (noting that *The Federalist* refers to powers granted by the Constitution as its "objects," implying the propriety of purposive interpretation).

82. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

83. *See, e.g.*, McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); *see also* F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 36-38 (1957) (describing late eighteenth and early nineteenth century advocates of literal judicial construction); F. HAYEK, THE CONSTITUTION OF LIBERTY 176-192 (1960); M. KAMMEN, *supra* note 50, at 16-20 (describing organic and mechanical metaphors used to describe the Constitution, ascribing the former to the Progressive movement).

84. 5 U.S. (1 Cranch) 137 (1803).

85. The Declaration of Independence para. 2 (U.S. 1776); J. REID, *supra* note 45, at 5-6, 12; *see id.* at 229 (describing eighteenth century England as moving from a constitution of rights to one of power). F. HAYEK, *supra* note 83, at 182. A Bill of Rights headed the Massachusetts constitution of 1780.

86. U.S. CONST. amend. XIV, § 5. The Bill of Rights contains no similar clause, but Congress surely has the power to provide remedies for unconstitutional abuses of authority by federal employees.

87. *See* Board of Educ. v. Allen, 392 U.S. 236, 241 n.5 (1968); G. GUNTHER, CONSTITUTIONAL LAW 21-29 (11th ed. 1985).

88. *E.g.*, U.S. CONST. art. I, § 3, cl. 7; art. I, § 8, cl. 12; art. I, § 10; art. III, § 3; art. V; art. VI, cl. 3.

89. *E.g.*, U.S. CONST. art. I, § 8, cl. 4 (power to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States") (emphasis added).

At first sight, the structure of the Constitution emphasizes the constitution of power. In the preamble, We the People use verbs of action and creation: form, establish, insure, provide, promote, secure, ordain.[90] The very first of the seven articles begins by vesting "legislative Powers" in a Congress and, after providing for the selection and operations of Congress, proceeds to enumerate its powers, which are substantially all the powers of the central government.[91] Charles Black argues that this article, with minor additions, would have sufficed to create our present governmental structure.[92] The next article vests the "executive Power"—again a mighty one, but lesser than the legislative power because its main function is to "take Care that the Laws" passed by Congress "be faithfully executed."[93] The "judicial Power" conferred by Article III is smaller still,[94] because the judiciary is not only bound by the laws, but also "has no influence over either the sword or the purse."[95] Article IV ensures the states and their citizens comity, territorial integrity, and a republican form of government; its main thrust is to limit the powers of the states, but it does confer enforcement powers on Congress and the central government as a whole.[96] Article V grants what might be called powers of a second order, or metapowers: the power to amend the Constitution itself, thus expanding or limiting the powers it grants. Similarly, the supremacy provisions of article VI direct that the rest of the Constitution will be legally binding once ratified; and article VII provides for ratification.

It was not by accident that the Constitution's provisions line up in this dwindling parade, starting with the potent Congress and ending with brief technicalities. The Articles of Confederation had no such organization. They first conferred a name on the confederacy, proceeded in article II to emphasize the retained sovereignty of the states, and did not set forth Congress' powers until article IX. The draft of the Constitution that the Committee of Detail submitted to the Philadelphia Convention[97] also diverged from the Constitution's present structure,

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90. U.S. CONST. preamble; *see* J.B. WHITE, *supra* note 4, at 240-41. Similar verbs characterize Congress' powers. U.S. CONST. art. I, § 8; art. III, § 1. The President, in her oath, undertakes more nurturing functions: to preserve, protect, and defend. U.S. CONST. art. II, § 1, cl. 8.

91. U.S. CONST. art. I, §§ 1, 8. Some powers are conferred on Congress elsewhere. *E.g.*, U.S. CONST. art. III, § 1; art. III, § 2, cl. 3; art. III, § 3, cl. 2.

92. Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841 (1975).

93. U.S. CONST. art. II, §§ 1, 3. The President's military, treaty, and appointment powers, of course, go beyond executing Congressional directives, and Presidents have gathered other powers around these.

94. U.S. Const. art. III, § 1.

95. THE FEDERALIST No. 78, at 540 (A. Hamilton) (C. Rossiter ed. 1961).

96. Congress may implement the full faith and credit clause, U.S CONST. art. IV, § 1, admit new states, *id.* at § 3, cl. 1, and regulate United States property, *id.* at § 3, cl. 2. The central government must protect the states against invasion and guarantee them a republican form of government. *Id.* at § 4. A somewhat similar section elsewhere, *id.* at art. I, § 10, in effect prohibits states from interfering with certain Congressional powers.

97. Report of the Committee of Detail, *reprinted in* 2 M. FARRAND, *supra* note 7, at 177-89.

which first appeared in the report of the Committee of Style.[98] That Committee perhaps wanted to emphasize the strengths of the new government. Gouverneur Morris, who apparently wrote its report,[99] vigorously supported governmental vigor.[100] The Committee may also have wanted (somewhat inconsistently) to disarm opposition to the Constitution by showing that it bestowed power primarily on a legislature accountable to the states and voters, rather than on the executive or judiciary.

Yet the text's emphasis on power conceals a contrary sequence which emerges when we look at the Constitution as a constitution of limits. The specifics of article I limit the broad goals of the preamble. Article II limits Congress' article I powers, because a statute accomplishes little unless the President enforces it. The article III courts in turn limit the powers of Congress and the President by construing statutes and judging the constitutionality of legislative and executive action. The territorial and governmental integrity of the states, safeguarded by article IV, limits all three branches of the central government. Article V's amendment procedures limit the whole preceding system, making it possible to pass amendments forbidding any offensive act or power. But the new government, with or without amendments, can exist only so long as it is supported by article VI, which makes the Constitution itself "the supreme Law of the Land" prevailing over inconsistent Congressional and Presidential acts; and the Constitution itself rests in the hands of the state conventions that must ratify it under article VII to bring it into effect. From this standpoint, each succeeding Article is more, not less, important than the preceding article. Each controls the powers granted by what precedes it.

The structure of the text thus reflects a tension between power and limit. Perhaps it would be clearer to describe this as a tension between two kinds of power: the power to act and the power to define and assess the validity of actions, the power to write laws and the power to read them. The Constitution emphasizes the first kind of power, but it also asserts the second kind. Indeed, a written constitution cannot help committing itself both to the power of writing and to the power of those who construe it. Repeatedly, the authors elaborate their bare style in an attempt to nail things down by repeating words: common Defence and general Welfare; Duties, Imposts and Excises; Science and useful Arts; provide and maintain; Government and Regulation; necessary and proper.[101] (Do these repetitions hint that the Framers

98. Report of the Committee of Style, *reprinted in id.* at 590-603.

99. M. MINTZ, GOUVERNEUR MORRIS AND THE AMERICAN REVOLUTION 198-201 (1970).

100. *See id.* at 180-98. Toward the end of the Convention, he proposed "another Convention, that will have the firmness to provide a vigorous Government, which we are afraid to do." Journal entry of August 31, 1787, *reprinted in* 2 M. FARRAND, *supra* note 7, at 479.

101. U.S. CONST. art. I, § 8. Many similar doublings can be found in other constitutional provisions.

doubted the power of their own language?) The actors fill the front of the stage; but those who define what the actors may do have the last word.

The tension is highest in the central article. The three first articles define the powers of the three branches of the national government; the three last ones define the validity of the Constitution itself. Article IV is in the middle. Approaching article IV from the beginning of the Constitution, we might expect to find in it the powers of the national government as a whole over the states, and so to some extent we do.[102] Approaching it from the end, we might expect to find state limits over the national government, and again would not be wholly disappointed.[103] Much of the article, however, concerns comity *between* the states: the full faith and credit clause, and the privileges and immunities clause, the extradition and fugitive slave clauses.

Article IV is the article of states, but it says little about the states' relations with the national government. The Framers no doubt wished to avoid this controversial and dangerous subject, leaving the controversy and danger to future generations. At the center of the whirlpool, we find an almost vacant space. This space is not part of the whirlpool, but helps to define its shape. Similarly, the Framers could allude to the states but did not have to describe them; the states already existed, and would inevitably limit the power of the new government where the Constitution did not restrain them. They are present not only in article IV, but before the preamble (which turns We the States into We the People) and after article VII (which leads to the signatures of the delegates, grouped by state). The national government was one among many governments, its constitution one among many authoritative texts.

Because article IV concentrates the enigmas of power and limit, and those of national and state government, one should not be suprised to find in it the Constitution's most enigmatic provision: "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[104] This clause is a microcosm of the Constitution, since republicanism was the ideal the Constitution was to implement;[105] yet it is an empty microcosm, with little ascertainable content. It ensures the republican base on which the central government was to stand; but it also offers that government the power to remodel its base. It focuses and exemplifies the tensions of constitutional democracy: the attempt to ensure genuinely popular government through a document

102. See provisions cited *supra* note 96.

103. Congress may not divide or merge states without their consent, ensuring the continued existence of states that can in turn resist the national government. U.S. CONST. art. IV, § 3, cl. 1.

104. U.S. CONST. art. IV, § 4. *See generally* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972).

105. *See* W. WIECEK, *supra* note 104, at 12-27; G. WOOD, *supra* note 22.

that overrides what the public may wish at a particular time. Providing for a republican government in so many words may seem more republican than providing specifications that interfere with future decisions; yet the words could be read to command everything, or nothing. The clause fuses power and limit; the central government is authorized to act, but also to assess whether a state has made action necessary by transgressing the constitutional prescription.[106] Perhaps it is because the guarantee clause distills the conflicts within the Constitution into an uncanny quintessence that people have usually refrained from invoking it.[107]

V.

Law is a kind of speech; constitutions are a kind of law. The Constitution vociferates amidst a hubbub of other voices.

Some voices arise from the Constitution itself. The Constitution provides for the promulgation of amendments; these sometimes silence the earlier text, but they also affect the way the Constitution will be heard by creating a rule of construction or a transforming content.[108] The text itself, moreover, fosters new voices. A written constitution is meant to guarantee stability and accessibility; but the writing can only be guaranteed by interpretations that extend, subvert, and reconstitute it. Judicial texts are the most familiar of these interpretations, but of course not the only ones.[109]

The Constitution both requires these voices and challenges them. It is now clear enough that the Framers contemplated judicial review of state and federal legislation.[110] It is equally clear that, while they told state judges to nullify state laws violating the Constitution,[111] they gave no comparably clear orders about federal laws. Still less did they direct that court decisions about constitutionality should bind other

106. The clause has been construed to vest Congress, not the courts, with these functions. *See, e.g.*, Texas v. White, 74 U.S. (7 Wall.) 700, 729 (1869).

107. Compare Freud's comment: "There is at least one spot in every dream at which it is unplumbable—a navel, as it were, that is the point of contact with the unknown." S. FREUD, THE INTERPRETATION OF DREAMS (1900) in 4 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 111 n. 1 (J. Strachey trans. 1953).

108. *E.g.*, U.S. CONST. amend. XI (federal judicial power "shall not be construed to extend to" suit against state by citizen of another state); Bolling v. Sharpe, 347 U.S. 497 (1954) (fifth amendment due process clause forbids federal government to segregate racially in ways that would violate the fourteenth amendment if done by a state).

109. *See supra* text accompanying notes 46-57; Cover, *supra* note 11; K. BURKE, THE PHILOSOPHY OF LITERARY FORM 109, 111 & n.26 (3d ed. 1973) ("the constitution cannot be interpreted as a positive document, but must continually be treated as an *act in a scene outside it*" (emphasis in original)).

110. *See* C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (2d ed. 1906); R. BERGER, CONGRESS V. THE SUPREME COURT (1969). *But see* L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 938-1046 (1953)

111. U.S. CONST. art. VI, cl. 2.

branches.[112] That is not to suggest that the text tells the Supreme Court not to review federal statutes, or tells Congress to ignore the Court. What the text institutes is precisely an interminable quarrel about the legitimacy of review and the interpretive supremacy of the Court.

The Constitution also interacts with a voice from which it itself springs, the voice of natural or moral law. A constitution is a superlaw meant to ensure the legitimacy of the governmental and legal system springing from it. It must therefore be a voice of reason as well as of power, a voice of principle as well as of practicality. If the Constitution is a covenant with death, as some abolitionists maintained, why should anyone owe it allegiance?[113] Yet if the Constitution dissolves into a moral debate, what is there to pay allegiance to? The voice of natural or moral law is not the same as the Constitution's own voice, but it also is not entirely different.

The Constitution's voice mingles with "lower" as well as "higher" ones. Often, it sustains those voices. It authorizes federal statutes, preserves the treaties and contracts of the Confederation and the land claims of the states,[114] and was soon amended to recognize that the people and states retained rights and powers.[115] But sometimes it silences other voices: it forbids states to enter into treaties and alliances,[116] and drowns out (sometimes by force) state constitutional provisions, statutes, and court decisions held to be inconsistent with its own commands.[117] Indeed, the flourishing of the Constitution's government means that institutions that might otherwise have existed will never find voice. "Power is only a variety of din."[118]

The Constitution, however, is less than an omnipotent monarch, declaring which other authorities shall live and which shall die. It depends on subordinate law. The privileges and immunities clause can only function if states grant their own citizens privileges and immunities; the contracts clause only if states allow contracts to come into existence.[119] In a larger sense, legislative practice and common law traditions shape interpretations of the Constitution, as well as being

112. *See* G. GUNTHER, *supra* note 87, at 21-29.

113. *See* W. WIECEK, *supra* note 13, at 228, 236-48; *see also* Corwin, *The Basic Doctrine of American Constitutional Law,* 12 MICH. L. REV. 247 (1914).

114. *See supra* note 26.

115. U.S. CONST. amend. IX, X. *See* Caplan, *The History and Meaning of the Ninth Amendment,* 69 VA. L. REV. 223 (1983).

116. U.S. CONST. art. I, § 10, cl. 1. Other state measures are preempted by implication. *See e.g.,* Zschernig v. Miller, 389 U.S. 429 (1968); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

117. U.S. CONST. art. VI, cl. 2, 3. On the supression by courts of competing visions and those who hold them, see Cover, *Violence and the Word,* 95 YALE L.J. 1601 (1986); Cover, *supra* note 11, at 40-44, 53-60.

118. M. SERRES, THE PARASITE 142 (L. Schehr trans. 1982).

119. U.S. CONST. art. IV, § 2, cl. 1; art. I, § 10, cl. 1. See also, among others, the due process clauses of the fifth and fourteenth Amendments, which do not create, but presuppose, the existence of "liberty" and "property."

shaped by them.[120]

We may seek to disregard these dialogues and interactions, letting the voices of the law fall into a banal hierarchy. Natural or moral law, the voice of God or conscience, ranks highest—for those who recognize its existence. Constitutions, the words of the people, are more powerful than statutes passed by their elected representatives. Last come common law decisions, subject both to the people and to the legislature.[121] This protocol of precedence seems securely based on democratic theory, like the ordering of the Constitution's articles.[122] Like that ordering, however, it is deceptive.

If we look at who interprets laws, rather than at who promulgates them, a contrary ordering emerges. A common law court construes its own decisions whenever it applies them; it keeps control of its words. The legislature can ensure that its own reading of its statutes prevails, but does so rarely, in reaction to differing readings by courts or others, and usually with prospective effect only. The people can in principle control their constitution, but only by a cumbersome amendment process that requires the people to speak through several sets of delegates and in supermajorities. As for God and conscience, they speak often enough to those who acknowledge them, but their hearers disagree about what they hear.

The Constitution, then, is the loudest of secular voices in one sense, but the weakest in another. The people speak it, or at least ratify its speaking, but their words then pass into the control of other speakers and mingle with other voices. Yet there is a final twist: this dispersion brings the Constitution back to the people, and helps its voice pervade the speech of citizens and officials.

VI.

It is strange to think that a nation could be governed by a text; but how could a nation ever be free of the dominion of texts? Lawyers, haunted by texts, nevertheless hope to escape from them. After paying formal respect to the words of the Constitution, we tend to plunge through them (as we think) to historical investigations, reconciliation of precedents, policy analysis, utopian theory, or something else. We might be more likely to make headway, not by trying to transcend our texts, but by listening more closely to the hesitations of their voices. Ultimately, it may be hard to distinguish between a central text like the Constitution and the society that writes and reads it. The society is more textual, and the text more social, than some would have it.[123]

120. *See, e.g.*, Nix v. Whiteside, 106 S. Ct. 988, 993 (1986); Solem v. Helm, 463 U.S. 277, 290-92, 299-300 (1983).

121. I leave out of this account administrative regulations, court rules, municipal ordinances, and other subordinate legislation.

122. *See* notes 90-100 *supra* and accompanying text.

123. *See* Sarat, *In the Shadow of Originalism*, in 29 NOMOS: AUTHORITY REVISITED 254 (J.

And both are riven by conflicts that can never be resolved.

This essay has not resolved any issues of constitutional interpretation, has not traced all the Constitution's quarrels with itself, and has not given a historically adequate account of the Framer's thoughts. Perhaps it has helped show the Constitution in a new light, one less focused on the role of the Court and the reading of particular provisions, and more on what it means to constitutionalize. The idea of a constitution is not a transparent one; much had to be hidden before people could simply assume that one could promulgate a charter that would be at once republican, supreme, workable, principled, stable, flexible, united, balanced, clear, profound, empowering, and protecting. Any constitution participates in the tensions these opposing goals create, and also in particular tensions that attend its own creation.[124] If it has a deep structure, that structure is unlikely to be perfectly harmonious. Will reading the Constitution in this light change anything? We could talk about it.

Pennock & J. Chapman eds. 1987). As Neil Hecht reminds me, although Judaism provides perhaps the clearest example of a people constituted by a text, even nations without a constituting text usually have a shared mythology.

124. *See* F. MCDONALD, *supra* note 19; G. WOOD, *supra* note 22, at 259-89; Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167 (1987); Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986).